BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CARLOS FABELA Claimant	)	
VS.	)	
EXIDE TECHNOLOGIES Respondent	)	Docket No. 1,050,357
AND	)	
AMERICAN ZURICH INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 25, 2011, Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on July 20, 2011. The Director appointed E.L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of former Board Member Julie A.N. Sample. Scott J. Mann, of Hutchinson, Kansas, appeared for claimant. Dustin J. Denning, of Salina, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant met his burden of proof that he suffered personal injury by accident on January 20, 2010, that arose out of and occurred in the course of his employment with respondent but that claimant failed to prove he suffered a series of accidents as a result of his work activities between January 20, 2010, and February 18, 2010. The ALJ further found that claimant failed to give timely notice of the January 20, 2010, accidental injury and failed to establish just cause for enlargement of the notice period to 75 days. Accordingly, the ALJ denied claimant workers compensation benefits.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant requests review of the ALJ's finding that he did not prove he sustained injuries in a series of accidents from January 20, 2010, through February 18, 2010. Claimant also asserts there was just cause for enlargement of the notice period to 75 days after the January 20, 2010, accident. If the claim is found compensable, the claimant contends he is entitled to a scheduled disability award of 12 percent to the left lower extremity based on Dr. C. Reiff Brown's rating opinion; payment of his reasonable and necessary medical bills; payment of temporary total disability benefits from June 16 through August 16, 2010; and future medical treatment.

Respondent argues that claimant failed to give timely notice of his January 20, 2010, accident and failed to show just cause for the notice to be extended to 75 days. Respondent further contends that claimant failed to establish that he suffered a series of injuries through February 18, 2010. In the event the Board finds the claim compensable, respondent argues that the evidence shows that claimant was not temporarily totally disabled for the period from June 16, 2010, through August 16, 2010, and that claimant failed to establish he is entitled to payment of medical benefits.

The issues for the Board's review are:

(1) Did claimant sustain personal injury in a single accident on January 20, 2010, and/or did he suffer a series of injuries from January 20, 2010, through February 18, 2010?

(2) Did claimant give respondent timely notice of his accident of January 20, 2010? Does the evidence show that there was just cause for the notice to be extended to 75 days after January 20, 2010?

(3) If the claim is found to be compensable, what is the nature and extent of claimant's disability?

(4) If the claim is found to be compensable, is claimant entitled to temporary total disability benefits for the period from June 16, 2010, through August 16, 2010?

(5) If the claim is found to be compensable, is claimant entitled to payment of medical benefits, past and future?

FINDINGS OF FACT

Claimant works for respondent as an assembly operator. He works a 12-hour shift, and most of that time he is standing or walking on concrete. He is in charge of nine machines that assemble batteries, and he puts the finished product on pallets and wraps the pallets with plastic. On January 20, 2010, claimant slipped while wrapping a pallet, and he twisted his left knee. His left knee did not hit the floor. He felt a pop in his knee and

had immediate pain. No one at respondent saw the accident, and claimant did not report the accident to his supervisor or anyone else. He worked the rest of his shift that day, about six more hours. He said he continued to have pain but thought he could handle it. He went back to work the next day but said he took Ibuprofen every day thereafter. He did not report his accident because he thought it would get better.

When claimant began working for respondent, he went through orientation, and he knew if he had an on-the-job accident he was supposed to immediately report it to his supervisor. But he also said that respondent said he could not report everything because he could not spend all his time at the nurse's station.

Claimant said he has had problem with his joints for ten years and has been taking Naprosyn for rheumatoid arthritis for eight or nine years. That was also about the time he experienced swelling in his left knee after playing soccer. Claimant also had swelling in his left knee about five years ago, but the swelling went down and he was able to go back to work and perform his job normally. Before January 20, 2010, he could walk and run, but he has not run since then. Claimant said the pain he experienced after his accident at work was a different kind of pain than his arthritis pain.

About a week after the accident, claimant's left knee started to swell, and he began to put ice on his knee to get the swelling to go down. His pain was getting worse. He began to slow down his production at work because of the knee pain, and he purchased and wore a knee brace. Still, the pain and swelling got worse. On February 18, 2010, claimant's knee was swollen. He tried ice and medication and neither worked. He then reported his January 20 accident to his supervisor and was told to go to the nurse's station and fill out a report.

Claimant was sent to Occupational Health Partners (OHP) by respondent on February 24, 2010. Claimant told the medical personnel that he had pain in his knee and had tried Ibuprofen, Icy Hot, ice, and had worn a knee brace. He told OHP that standing for a 12-hour shift was painful. Claimant was sent for an MRI, after which he was told he needed to have surgery on his knee.

On April 26, 2010, claimant was sent to Dr. Kenneth Jansson, a board certified orthopedic surgeon who limits his practice to knee surgery, for an independent medical examination.[1] Claimant reported that on January 20, he felt a popping situation and felt an onset of pain but continued to work. He placed ice on the knee and wore a brace to work, but the pain continued to worsen. Claimant also related to Dr. Jansson that he used to play a lot of soccer and had an injury in 2000 to his left knee, for which he had no treatment. Dr. Jansson diagnosed claimant with a torn medial meniscus. He also said that

[1] The record is not clear who referred claimant to Dr. Jansson.

claimant had degenerative arthritis, a flexion contracture, and a history of rheumatoid arthritis. He recommended arthroscopic surgery to treat claimant's meniscus tear.

Respondent denied claimant's claim for workers compensation because of failure to timely report his accident. After a preliminary hearing held June 1, 2010, the ALJ also denied his claim, finding he had not suffered a series of accidents through February 18, 2010, and also that he did not prove just cause to extend the period of time to notify respondent of the accident of January 20, 2010.

After the preliminary hearing, claimant was told by respondent that he could not return to work until he had a full release with no restrictions. Claimant applied for and received short-term disability benefits of $140 per week. Claimant then sought medical treatment for his knee problem on his own. On June 16, 2010, he returned to Dr. Jansson. At that time, Dr. Jansson scheduled claimant for surgery but told him he would continue to have left knee problems after the surgery because of his preexisting rheumatoid arthritis, osteoarthritis and flexion contracture.

Dr. Jansson performed surgery on claimant's left knee on July 6, 2010. He repaired the medial meniscus tear, debrided some synovitis, and aspirated a Baker's cyst. Dr. Jansson said claimant had extensive synovitis, which can be caused by rheumatoid arthritis or can be related to trauma. A Baker's cyst can also be related to arthritis or rheumatoid arthritis, and it is very common in conjunction with a meniscus tear. Dr. Jansson opined that claimant should have been off work for a period of seven days after his surgery.

Dr. Jansson saw claimant again on July 19, 2010, and said claimant was doing well. He gave claimant restrictions of no lifting over 20 pounds, no kneeling, no squatting, and no climbing of stairs. The last time Dr. Jansson saw claimant was on August 16, 2010. The motion was good in claimant's knee, he did not have a lot of complaints, and he seemed to be ambulating well. At that time, Dr. Jansson gave claimant a full release with no restrictions, and claimant returned to work at respondent.

Dr. Jansson rated claimant as having a 2 percent permanent partial impairment to the left lower extremity, based on the AMA *Guides*.[2] He rated claimant only for the meniscal tear, saying that the rest of claimant's problems were preexisting.

Dr. Jansson was asked by claimant's attorney about claimant's claim that he suffered a series of accidents from January 20, 2010, through February 18, 2010.

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[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

> Q. [by claimant's attorney] The fact that [claimant] began experiencing what he thought was additional pain and swelling, would that be consistent with his work activities further aggravating his underlying meniscus tear?
>
> A. [by Dr. Jansson] Yeah. If he got a meniscus tear, you can certainly twist or turn or do things that can make it hurt worse.
>
> Q. And he's testified, and again I think he gave a history to you of additional swelling and pain through the date he reported it on–
>
> A. Uh-huh.
>
> Q. –February 18, 2010. Would it be your opinion, based on medical probability, that the work activities–the standing, kneeling, bending and twisting–continued to aggravate his knee up through the date he reported it?
>
> A. Uh-huh.
>
> Q. Is that a yes?
>
> A. Yes.[3]

Dr. Jansson also stated: "I don't think [claimant's] long-term impairment has been affected at all by working a couple weeks [after the January 20, 2010, accident], no."[4]

Dr. C. Reiff Brown is a retired board certified orthopedic surgeon. He is also board certified by the American Academy of Disability Evaluating Physicians. At the request of claimant's attorney, he evaluated claimant on two occasions, May 4, 2010, and September 7, 2010. On May 4, 2010, Dr. Brown took a history from claimant, reviewed medical records and performed a physical examination. Claimant told Dr. Brown that he had immediate onset of pain at the time of his accident in January 2010. Dr. Brown believed that claimant's swelling began a few days later. He reviewed an MRI scan of claimant's left knee that had been taken on March 15, 2010. The scan revealed a tear of the posterior horn of the medial meniscus and an area of osteochondritis dissecans in the medial femoral condylar area.[5] Dr. Brown opined that claimant needed arthroscopic surgery in the form of a partial medial menisectomy and probable debridement of the osteochondral defect. He advised that claimant avoid frequent long walks, frequent use of stairs and ladders, frequent squatting, crawling and kneeling on the left knee. He believed with those restrictions, claimant would have been temporarily and totally disabled from gainful employment.

Dr. Brown evaluated claimant a second time on September 7, 2010. Claimant had undergone surgery on his left knee. Dr. Brown observed that claimant had an antalgic gait, which he indicated was consistent with his objective finding in the examination of atrophy in claimant's left leg. He believed that claimant's antalgic gait was entirely due to his injury and subsequent surgery. After examination, Dr. Brown opined that claimant had suffered

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[3] Jansson Depo. at 19-20.

[4] Jansson Depo. at 27.

[5] Dr. Brown said the osteochondritis dissecans preexisted claimant's accident.

a tear of a posterior portion of the medial meniscus and had aggravated his preexisting synovitis and degenerative arthrosis. It was Dr. Brown's opinion that claimant's ongoing work after January 20, 2010, permanently aggravated the original injury.

Dr. Brown found claimant to be at maximum medical improvement on September 7, 2010. Using the AMA *Guides*, he rated claimant as having a 2 percent left lower extremity permanent partial impairment on the basis of a partial medial menisectomy and an additional 10 percent impairment of the left lower extremity due to atrophy of quadriceps muscle. These combined to total 12 percent permanent partial impairment of the left lower extremity, which he opined was the result of claimant's injury and subsequent work activity through February 18, 2010.

Dr. Brown recommended that claimant avoid work that involves frequent use of stairs or ladders, frequent long walking, squatting and crawling. If claimant engaged in these activities, Dr. Brown anticipated he would have more pain in his knee, more swelling, and possible additional damage to the meniscus structures of the knee. It would also make claimant's antalgic gait worse and increase symptoms in his hips and low back.[6]

Dr. Brown believes that by not seeking medical treatment on or shortly after January 20, 2010, and by his continuing to work, claimant caused further injury to his knee. He believed that claimant could have extended a cartilage tear and could have felt instability of the knee. He believes there is evidence in this case that claimant suffered structural changes to his knee after the injury of January 20 until the time he reported the accident on February 18, 2010. Dr. Brown said that claimant told him he had increasing symptoms during that period of time and it was in that period of time that claimant gradually developed a limp.

> Q. [by respondent's attorney] Wouldn't–the increase in symptoms over that approximate 28 days, isn't that consistent with just a natural progressive worsening of the original injury?
>
> A. [by Dr. Brown) I believe that's what it was, yes.
>
> Q. All right. And the worsening pain that the claimant testified about, would you consider that the natural and probable consequence of the original injury?
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> A. Yes, I believe it was, although I believe as he got off his knee, put it in some sort of immobilizing device and minimized his weight bearing, he got well faster.[7]

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[6] Dr. Brown opined that there was a good chance claimant may develop some back discomfort as a result of his antalgic limp. Since claimant was only three months post-surgery when Dr. Brown saw him in September 2010, it would have been too soon to address whether claimant was in need of treatment to his low back.

[7] Brown Depo. at 29.

Dr. Brown agreed that any activity of day to day living, like walking, would cause further injury to the knee. He indicated that other than claimant's subjective complaints, there is no objective evidence that claimant sustained any further structural damage to the knee over the course of 28 to 30 days after the injury. Dr. Brown indicated that the progression of a worsening injury would be the natural and probable consequence of the original injury. He also indicated that claimant's additional pain and swelling subsequent to the accident would be consistent with a worsening or an aggravation of the underlying accident. He opined that the preexisting conditions of arthritis and the Baker's cyst were aggravated and rendered symptomatic by this accident and claimant's continued work activities through February 18, 2010.

Robert Barnett, Ph.D., is a clinical psychologist, rehabilitation counselor and job placement specialist. He does not have a license to practice medicine and is not claimant's treating physician. He does not have a formal education in the area of rehabilitation. At the request of claimant's attorney, Dr. Barnett evaluated claimant with respect to whether he was temporarily and totally disabled for the period of time from June 16, 2010, when Dr. Jansson originally issued a restriction slip, through claimant's release to regular duty work on August 16, 2010. Dr. Barnett reviewed the temporary and permanent work restrictions and releases provided by Dr. Jansson.

Dr. Barnett also spoke with claimant by telephone to get information about his education, language skills, and work history. The phone interview lasted 20 to 25 minutes. Dr. Barnett did not have an interpreter present during the phone interview. Dr. Barnett noted that claimant's ability to communicate in English was somewhat limited. Claimant told Dr. Barnett he could read some of the newspaper, which indicated to Dr. Barnett that he reads below the 8th grade level. Claimant also told Dr. Barnett that his work history has mostly been laboring-type jobs in the medium to heavy category. Claimant did not give Dr. Barnett any specific examples of jobs he had or specific tasks he performed other than at respondent. Dr. Barnett was more concerned about whether claimant did physical and manual labor.

Dr. Barnett opined that claimant's limited ability to communicate in English, limited education and limited ability to read and write English would negatively affect his employability. Dr. Barnett opined that under the Workers Compensation Act, claimant was temporarily and totally disabled during the period of June 16 through August 16, 2010.

Dr. Barnett was provided information by claimant's attorney that for a period of time claimant had returned to work at respondent in an accommodated position. Dr. Barnett was only told that the job position was light duty; he did not know what specific job duties claimant performed during that period. Dr. Barnett said that the fact claimant performed accommodated work was not a basis to opine that he could perform some type of substantial and gainful employment because the accommodated light employment is not a standard position that would normally be offered. He said that in a sense, it would be

artificial. Dr. Barnett, however, stated he had no evidence suggesting that respondent created an artificial or made-up position for claimant.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[8] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[9]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[10] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[11] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[12]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant

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[8] K.S.A. 2010 Supp. 44-501(a).

[9] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[10] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[11] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[12] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

> shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 44-510c(a)(2) states:

> Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

K.S.A. 2010 Supp. 44-510h(a) states:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 2010 Supp. 44-510k(a) states in part: "At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment."

ANALYSIS

The ALJ did not specifically comment on claimant's credibility, but he apparently found claimant's testimony to be credible because he found, based on that testimony, that claimant did sustain an accident at work on January 20, 2010, as alleged. He further found that claimant sustained personal injury in that accident that resulted in a 5 percent permanent impairment of function to the leg. Claimant, however, was denied compensation due to a lack of timely notice. The Board finds that notice was timely. Although claimant was aware that he suffered an accident at work on January 20, 2010,

and had been instructed to immediately report all work-related accidents, claimant had also been told that he could not report everything because he could not spend all his time at the nurse's station. Claimant had experienced knee pain and swelling before. Each time the swelling eventually went down and claimant had been able to return to his regular job. After the January 20, 2010, accident, claimant believed that he could work through his injury and that it would get better. Claimant continued to do his job. However, his knee did not get better. In fact, it got worse. Eventually, on February 18, 2010, after the swelling had gotten so bad that claimant could not continue working, he went to his supervisor and reported his injury.

K.S.A. 44-520 provides that "[t]he ten-day notice . . . shall not bar any proceeding for compensation . . . if the claimant shows that a failure to notify . . . was due to just cause . . . ." In such cases, notice must be given within 75 days after the date of accident. The Board finds claimant has established just cause for his failure to give notice within 10 days of January 20, 2010, and that his notice on February 18, 2010, was within 75 days of the accident. Therefore, notice was timely.

In addition to the injury claimant sustained from the specific trauma, claimant described having occurred on January 20, 2010, claimant continued to suffer traumas and aggravations of his condition each and every working day through February 18, 2010. As such, the notice claimant gave to respondent on February 18, 2010, was likewise timely notice of accident for his series of accidents.

As a result of his work-related accidents, claimant suffered permanent injuries to his left knee. Dr. Jansson rated claimant's resulting permanent impairment of function as 2 percent to the left lower extremity. Dr. Brown agreed with Dr. Jansson that the partial medial menisectomy qualified claimant for a 2 percent impairment under the AMA *Guides*. However, Dr. Brown said claimant was entitled to an additional 10 percent impairment of the left lower extremity due to atrophy of the quadriceps muscle. These two ratings combine to a 12 percent permanent impairment of the lower extremity. Dr. Brown opined that this 12 percent impairment was the result of claimant's January 20, 2010, injury and his subsequent work activity through February 18, 2010. The Board finds both opinions are credible and, therefore, are entitled to equal weight. The Board concludes claimant suffered a permanent impairment of function of 7 percent to the leg.

In addition to the temporary partial disability benefits respondent has paid, claimant is seeking an award of temporary total disability compensation for the period from June 16, 2010, through August 16, 2010. No physician has said that on account of the injury claimant was "rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment."[13] Dr. Jansson said that claimant should have been

[13] K.S.A. 44-510c(b)(2).

off work for a period of seven days after his July 6, 2010, surgery. K.S.A. 44-510c(b)(1) provides:

> Where temporary total disability results from the injury, no compensation shall be paid during the first week of disability, except that provided in K.S.A. 44-510h and 44-510i and amendments thereto, unless the temporary total disability exists for three consecutive weeks, in which case compensation shall be paid for the first week of such disability.

Because claimant has failed to establish that he was temporarily and totally disabled for a period of three consecutive weeks, he is not entitled to an award of temporary total disability compensation over and above the weeks of temporary partial disability already paid.

Respondent paid claimant a total of $4,074.32 in temporary partial disability compensation. At the applicable maximum compensation rate of $546, this equates to 7.46 weeks of temporary total disability compensation for purposes of calculating the permanent partial disability award.

Finally, the Board finds that the medical treatment claimant received for his knee was reasonable and should be paid as authorized medical expense per the Kansas fee schedule.

CONCLUSION

(1) Claimant sustained personal injury by accident on January 20, 2010, followed by a series of accidents and aggravations each and every working day through February 18, 2010.

(2) Claimant gave respondent timely notice of his accidents.

(3) As a result of his work-related injuries, claimant has a 7 percent permanent functional impairment to his left lower extremity and is entitled to an award of permanent partial disability compensation based upon a 7 percent scheduled injury to the leg.

(4) Claimant has failed to prove he is entitled to temporary total disability compensation for the period of June 16, 2010, through August 16, 2010.

(5) Claimant is entitled to payment of all reasonable and related medical expenses as authorized medical and future medical upon proper application to and approval of the Director.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated April 25, 2011, is modified as follows:

Claimant is entitled to 7.46 weeks of temporary total disability compensation[14] at the rate of $546 per week in the amount of $4,073.16 followed by 13.48 weeks of permanent partial disability compensation, at the rate of $546 per week, in the amount of $7,360.08 for a 7 percent loss of use of the left leg, making a total award of $11,433.24.

IT IS SO ORDERED.

Dated this ___ day of August, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: Scott J. Mann, Attorney for Claimant
Dustin J. Denning, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

[14] The number of weeks of temporary total disability after conversion of temporary partial disability to temporary total disability.